Paxson currently owns 49 television stations nationwide; after the completion of pending transactions, it will own 69 stations nationwide representing 66.3% of the television households in the country. Absent the UHF discount, Paxson's ownership interests would exceed the national cap. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest and the seventh network would cease to exist. Neither Paxson nor other group owners should be penalized for their full compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has not suggested, as it has with other pending ownership rule changes[49] that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious of circumstances.

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[49] *See, e.g., Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221, 87-7, 11 FCC Rcd 21655, 21672, ¶ 38 (1996) (adopting interim duopoly waiver policy conditioned on outcome of Rule Making proceeding) ("*Second Further Notice*"); *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (announcing policy that certain waivers of one-to-a-market rule would be conditioned on outcome of television ownership proceeding).

For instance, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."[50] In that proceeding, the Commission only required divestiture where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.[51] The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.[52]

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,211 licensed commercial television stations in the United States,[53] Paxson would own only 69,

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50/ *Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, Docket No. 18110, 50 FCC 2d 1046, 1078, 1080 ("*1975 Second R & O*"), *recons. granted*, *Memorandum Opinion and Order*, Docket No. 18110, 53 FCC 2d 589 (1975), *modified*, *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

51/ *1975 Second R & O*, 50 FCC 2d at 1081-82.

52/ *Id.* at 1054.

53/ *Broadcast Station Totals As of May 31, 1998*, *News Release* (rel. June 19, 1998).

only slightly more than 5% of the total number of commercial television stations. Notwithstanding this relatively small percentage, Paxson's stations will represent a new programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a whole. If the network is not able to retain ownership of its distribution in the early years of its development, its chances of succeeding as an effective competitor to other networks will be slim indeed. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

> the whole or a part of an agency statement of general or particular applicability and <u>future</u> effect designed to implement, interpret, or prescribe law or policy[54/]

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[55/] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally

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[54/] 5 U.S.C. § 551(4)(1994) (emphasis added).

[55/] *See, e.g., American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980).

induced, settled expectations of private parties.[56] The Supreme Court recognizes that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"[57] This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[58]

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements:[59] (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one. Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions. *See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, First Report and Order*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); *1975 Second R & O*, 50 FCC 2d at 1074

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[56] Retroactive rules are not *per se* improper. *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463, 471 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

[57] *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (citation omitted).

[58] *Cf. Amendments of Parts 20 and 24 of the Commission's Rules, Report and Order*, WT Docket No. 96-59, 3 Communications Reg. (P&F) 433, 471 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

[59] *See, e.g., Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 2 Communications Reg. (P&F) 76, 82 & n.42 (1995).

(grandfathering broadcast-newspaper cross-ownership); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order*, Docket No. 12782, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd*, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order*, Docket No. 14711, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, *First Report and Order*, Docket No. 20548, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); *Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations*, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, Docket No. 16068, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions). A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice.

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of retroactive regulation.[60] Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of the UHF stations acquired by Paxson over the last four years are weaker or newly-constructed UHF stations that would be economically devastated if divestiture is required. Under separate ownership, these stations would not have the same access to low cost, competitive diverse programming or significant financial resources, both of which are critical for newly operating and weaker stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

Finally, there would be no statutory interest in applying the new rule. Congress has only required that the Commission review the UHF discount as part of an overall review of the ownership rules. There has been no mandate from Congress to repeal the UHF discount nor has Congress suggested that if ownership rule changes are adopted, they should be applied retroactively.

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests: it would also disserve the public interest in enhanced television service.

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[60] *See, e.g.*, *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

ATTACHMENT

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Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35, pp. 2-23, filed August 21, 1998.

among television program networks, and provide an incentive for the development of new networks.

In its own Comments in this proceeding, Paxson urged the FCC to increase the national television audience reach cap to 40%. Paxson demonstrated that this small increase in the national cap would have no adverse impact on the intensely diverse and competitive television industry. In these Reply Comments, Paxson also urges the Commission to create an exemption to the national audience reach cap for those companies with a non-controlling ownership interest in minority-owned and new entrant broadcasters. This exemption would encourage investment in minority-owned companies, without having any negative effect on diversity and competition.

Finally, Paxson supports elimination of the dual network rule. As demonstrated by numerous commenters, the prohibition on ownership of two broadcast networks no longer serves the public interest and should be repealed.

II. THE UHF DISCOUNT.

There is no basis for the suggestion made by some commenters that the UHF discount should be eliminated because the UHF signal handicap no longer exists or that retaining the UHF discount will have an adverse impact on diversity and competition.[2] As Paxson demonstrated in

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[2] *See* Joint Comments of Press Communications, LLC and Greater Media, Inc., MM Docket No. 98-35, filed July 21, 1998, at 4 ("Press Comments"); Comments of National Broadcasting Company, Inc., MM Docket No. 98-35, filed July 21, 1998, at 16 ("NBC Comments"); Comments of Center for Media Education, Chinese for Affirmative Action, The Civil Rights Forum, Feminist Majority Foundation, League of United Latin American Citizens, Minority Media and Telecommunications Council, NOW Legal Defense and Education Fund, Philadelphia Lesbian and Gay Task Force, Rainbow/PUSH Coalition and Women's Institute for Freedom of the Press, MM Docket No. 98-35, filed July 21, 1998, at 17 ("CME Comments"); Comments of ABC, Inc., MM Docket No. 98-35, filed July 21, 1998, at 18-21 ("ABC Comments").

its Comments,[3] UHF stations' limited signal reach is a technical and economic handicap that has not been overcome through advanced receivers or mandatory carriage on cable systems. Nor will the handicap be corrected through the conversion to digital television ("DTV"). Because the conversion to DTV is based on service replication, not service maximization, UHF stations simply will not have the same DTV service areas as their VHF competitors. None of the commenters has submitted any evidence that the UHF discount has had an adverse impact on program diversity or economic competition. Indeed, the evidence demonstrates otherwise. Not only has program diversity and competition increased since 1985 when the UHF discount was adopted, but the UHF discount has proven essential to the growth of new broadcast networks, offering viable alternatives to the original three networks, ABC, CBS and NBC.

A. *Advances in Technology and Cable Carriage Have Not Corrected the UHF Handicap.*

1. *Receiver Technology Does Not Improve Signal Strength.*

Contrary to the assertions of ABC, Inc. ("ABC") and the Center for Media Education, *et al.* ("CME"),[4] improvements in television receivers have not leveled the playing field between UHF and VHF stations. As Paxson established in its Comments, a UHF signal is inherently weaker than a VHF signal. The propagation characteristics of a UHF channel make its signal transmissions far more susceptible to terrain obstructions than VHF signals, and receiver technology simply cannot compensate for this inherent signal problem.[5] As described in the

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[3] Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998, at 5-12 ("Paxson Comments").

[4] ABC Comments at 19; CME Comments at 17-18.

[5] *See* Joint Comments of Fox Television Stations, Inc. and USA Broadcasting, Inc., MM Docket No. 98-35, filed July 21, 1998, at 19-21 ("Fox/USA Comments"), and

Fox/USA Comments, even a UHF station operating with maximum facilities, nondirectional ERP of 5,000 kilowatts and HAAT of 610 meters, could achieve "only 69.1 percent of the maximum low band VHF Grade B area coverage, and only 79.2 percent of the maximum high band VHF Grade B area coverage."[6] Of course, no UHF station is able to achieve maximum facilities so it is clear that the actual differences between UHF and VHF coverage are much greater.[7]

The Commission has recognized that

> [d]ue to the physical nature of the UHF and VHF bands, *delivery of television signals is inherently more difficult at UHF.* It should be recognized that *actual equality between these two services cannot be expected* because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength. . . . [T]he fundamental limitation of UHF television involves its ability physically to reach viewers . . .[8]

Paxson is unaware of any changes in the laws of physics over the last 13 years that would change the inherent disparity between the UHF and VHF bands. UHF stations simply do not have the physical ability to achieve the signal coverage of a VHF station.[9] None of the commenters

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Engineering Statement of Jules Cohen, P.E., Attachment B thereto.

[6] *Id.* Attachment B at 3.

[7] *Id.*

[8] *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order*, 100 F.C.C.2d 74, 93 (1985) (emphasis added).

[9] *See* Comments of the Association of Local Television Stations, Inc., MM Docket No. 98-35, filed July 21, 1998, at 8 ("ALTV Comments") ("[T]he limitations imposed on the UHF band are a matter of physics that do not change with the passage of time."). *See generally* Fox/USA Comments, Exhibit B.

arguing against retention of the UHF discount has offered one iota of evidence to suggest otherwise.

2. *Cable Carriage Has Not Corrected the UHF Handicap.*

Mandatory cable carriage has not been the cure-all that ABC suggests.[10] Although UHF stations have benefitted from mandatory cable carriage, cable carriage has not completely alleviated the disparity between UHF and VHF stations. Even with mandatory cable carriage rights, UHF stations are *still disadvantaged* because of their weaker signals. The fact remains that only 65% of television households in the United States subscribe to cable.[11] Thus, UHF stations, because of their weaker signals are disadvantaged in reaching the remaining 35% of the nation's television households that receive broadcast signals over-the-air.

ABC's assumption that cable subscribers *ipso facto* receive via cable all of a market's UHF stations is grossly mistaken. Nothing could be further from the truth. A television station must provide a Grade B signal to a cable system headend in order to obtain mandatory cable carriage. Because of their limited service areas many UHF stations do not provide Grade B coverage to all cable headends in their market. Accordingly, many UHF stations are not carried on all of the cable systems in their markets because their signals cannot reach the system's headend. In addition, based on signal problems, cable systems routinely request authority from the FCC not to carry a UHF signal in certain communities and the FCC routinely grants such requests.

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[10] ABC Comments at 19.

[11] *Broadcasting & Cable Yearbook 1998* at xxxi.

As an example, since 1996, numerous cable systems serving communities in the New York and New Jersey portions of the New York, New York Designated Market Area ("DMA"), as defined by A.C. Nielsen, have petitioned the FCC for permission not to carry Paxson's television station WIPX(TV), licensed to Bridgeport, Connecticut and included in the New York Area of Dominant Influence ("ADI"). The FCC has, in almost all cases, granted those petitions based in large part on the station's limited coverage of the market. *See, e.g.*, *Petition of U.S. Cablevision, Memorandum Opinion and Order*, 12 FCC Rcd 21144, 21154 (1997), where the Commission granted the cable operator's petition to delete from WIPX(TV)'s television market communities in Dutchess, Orange, Putnam and Ulster Counties lying outside of the station's Grade B contour;[12/] *Petition of TKR Cable Company, Memorandum Opinion and Order*, 12 FCC Rcd 3525, 3533 (1997), in which the Commission authorized TKR Cable not to carry WIPX(TV) on its systems serving communities in Orange County, New York, and Hamilton, Mercer, Monmouth, Middlesex, Ocean, Passaic, Somerset and Union Counties, New Jersey, based on distance to the cable communities and the fact that WIPX(TV)'s Grade B contour did not reach the communities at issue; and *Petition of TCI of Northern New Jersey, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 891, 896 (1997), where the Commission granted the cable operator's petition to delete from WIPX(TV)'s television market 53 communities in northern New Jersey based in part on "dearth of viewership" and "lack of . . . Grade B coverage."[13/]

[12/] Communities falling within WIPX(TV)'s Grade B contour were not deleted. *See id.* at 21153.

[13/] *See also Petition of TKR Cable Company, Memorandum Opinion and Order*, 11 FCC Rcd 17121, 17127, 17129 (1996) (citing lack of Grade B coverage and distance from cable communities as reasons to delete New York and New Jersey communities from WIPX(TV)'s television market); *Petition of Time Warner New York City Cable Group, Memorandum Opinion*

Paxson estimates that as a result of these decisions, WIPX(TV) is currently carried on cable systems serving only four of the 29 counties in its own ADI! The 25 counties in which WIPX(TV) is *not* carried represent 89% of the ADI's television households.[14] Thus, in New York, due to its inability to obtain cable carriage, WIPX(TV)'s UHF handicap is 89%, not 50%.[15]

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and Order, 12 FCC Rcd 13094, 13101 (1996), where the Commission granted Time Warner's request to delete the communities of Northern and Southern Manhattan, Eastern, Western, and Southern Queens, Western Brooklyn, and Staten Island, New York from WIPX(TV)'s television market because "[b]ased on geography and other relevant information, [the FCC] believe[s] that the New York City cable communities are sufficiently removed from WHAI that they ought not be deemed a part of the station's market for mandatory carriage purposes;" *Petition of Continental Cablevision of Western New England, Inc., Memorandum Opinion and Order*, 11 FCC Rcd 6488, 6509, 6510 (1996), *aff'd*, 12 FCC Rcd 12262 (1997), deleting 13 communities in Westchester and Rockland Counties, New York from WIPX(TV)'s television market because "these communities fall outside of the station's Grade B contour and are on the far side of the Hudson River from WHAI's service area;" *Petition of Time Warner Entertainment-Advance/Newhouse Partnership, Memorandum Opinion and Order*, 11 FCC Rcd 6541, 6555, (1996), *aff'd*, 12 FCC Rcd 12262 (1997), where the Commission ruled that 14 communities in Bergen County, New Jersey should be deleted from WIPX(TV)'s television market because "Time Warner's communities are, on average, 61 miles away from the station and fall outside the fringe of the station's Grade B contour. In addition, the cable communities are separated from the station by New York City and the Hudson River;" *Petition of Clear Cablevision Inc. and Manchester Cablevision Inc. both d/b/a/ Adelphia Cable Communications, Memorandum Opinion and Order*, 11 FCC Rcd 22282, 22292 (1996), where the Commission deleted from WIPX(TV)'s television market the communities served by Adelphia's Ocean County, New Jersey cable systems citing "lack of historical carriage," "dearth of audience," "geographic distance," and "lack of Grade B coverage."

[14] *Broadcasting & Cable Yearbook 1997* at C-198.

[15] The story is similar for Paxson's other UHF stations. WPXB(TV) (formerly WGOT-TV), licensed to Merrimack, New Hampshire, in the Boston, Massachusetts ADI, is not carried on a number of cable systems in the ADI because it lacks the signal strength to provide sufficient Grade B coverage to communities served by those cable systems. *See, e.g., Greater Worcester Cablevision, Inc. Worcester, Massachusetts; For Modification of Television Broadcast Station WGOT's ADI, Memorandum Opinion and Order,* 12 FCC Rcd 17347 (1997); *Petition of Time Warner Cable for Modification of Market of Television Station WGOT-TV, Merrimack, New Hampshire. Memorandum Opinion and Order,* 12 FCC Rcd 23249 (1997).

The UHF/VHF disparity is further exacerbated by the fact that by virtue of statutory and regulatory restrictions, VHF stations enjoy preferred cable channel assignments over their UHF counterparts. Television viewers in cable households, like noncable viewers, locate the relatively highly-rated broadcast network programming on the lowest television channels, as most "Big Three" broadcast network affiliates are VHF stations.[16] Moreover, the typical television viewer logically begins the search for news or entertainment programming at or near the very lowest channel he or she receives, rather than initiating the "channel surfing" efforts at some arbitrary, double-digit channel that might correspond to or be near a local UHF station's channel assignment.

The audience's natural preference for low channels is compounded in the cable world. Under statutory and regulatory channel positioning restrictions, cable systems generally must assign television stations their on-air channels.[17] VHF stations, therefore, almost always obtain very low channel assignments in cable line-ups, whereas UHF channels naturally find themselves carried on high channels. As a result, VHF broadcast stations (and cable networks assigned to low channels by the local cable operators) obtain more initial "foot traffic" from television viewers than UHF stations, which, as a result of their mandated high channel assignments, see much less "foot traffic."

16/ *See* Paxson Comments at 19-20.

17/ 47 U.S.C. § 534(b)(6) (1994); 47 C.F.R. § 76.57 (1997).

A station or cable program with a low channel assignment, then, enjoys a higher probability of achieving a measurable level of viewership than one placed on a higher channel.[18] With the strong connection between channel position and profit in mind, cable operators prior to the adoption of the 1992 Cable Act were known to "root out" local broadcast stations from "prime VHF channel slots" in favor of "less popular cable services in which the cable operator ha[d] an equity interest and/or in which the cable operator [was] selling advertising time."[19] In that manner, the cable programer would have the opportunity "to catch" a much larger number of "grazing" viewers than would be possible at a higher channel assignment. Today, the typical cable channel line-up features less-than prominent high assignments for very low rated channels such as public, educational, government, leased access and similar program offerings, which, of course, surround the mandated channel assignments for local UHF stations.

Paxson believes that mandatory cable carriage has been critical to the survival of UHF stations. It has not, however, eliminated the inherent signal handicap suffered by all UHF television stations. These circumstances warrant retaining the UHF discount.

B. The Conversion to DTV Will Not Alleviate the UHF Handicap.

Press Communications, LLC's ("Press") argument that the UHF handicap will be eliminated through the implementation of DTV[20] ignores the basic premise underlying the allocation of DTV channels. The Commission's DTV allotment scheme is based primarily on

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[18] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, at 55. (1992) (House Committee "is aware that certain cable programmers offer cable systems financial incentives to be placed on a lower channel number where viewers initially 'graze' in search of an attractive program").

[19] *Id.* (quoting testimony before Committee).

[20] Press Comments at 5.

replication of existing analog service.[21] The Commission fully considered adopting a service maximization approach that would roughly equalize coverage among all television stations, regardless of current service areas.[22] Based in part on numerous objections from broadcasters, the Commission ultimately decided to base DTV channel allotments on service replication.[23]

Because DTV channels, power levels and height requirements are based on replication of existing service areas (rather than potential coverage with maximum facilities), it is not surprising that there are significant disparities between VHF stations' DTV technical parameters and those assigned to UHF stations. Paxson demonstrated in its Comments that a greater than 50% power disparity exists between analog UHF stations operating on DTV UHF channels, and analog VHF stations operating on DTV UHF channels.[24] In some markets, UHF stations have as little as 5% of the power as that assigned to VHF stations, thus ensuring that UHF stations will continue to operate with weaker signals, reaching fewer viewers even with the conversion to DTV.[25]

21/ *Advanced Television Systems and Their Impact upon the Fxisting Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, 14605 (1997) ("*Sixth Report and Order*"), *on reconsideration, Memorandum Opinion and Order on Reconsideration of The Sixth Report and Order*, 13 FCC Rcd 7418 (1998) ("*Sixth DTV Reconsideration*"), *appeal pending*.

22/ *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Second Further Notice of Proposed Rule Making*, 7 FCC Rcd 5376, 5379 (1992).

23/ *Sixth Report and Order*, 12 FCC Rcd at 14605.

24/ *See* Paxson Comments at 13.

25/ *See* Fox/USA Comments at 22 and Attachment B thereto.

C. DBS Will Not Ameliorate the VHF/UHF Signal Disparity.

The increased number and variety of video program distributors, while increasing competition in the video program market, has failed to reduce the significant disparities between VHF and UHF stations. As Univision noted in its Comments, the widespread use of high-quality (and even digital) cable, the Direct Broadcast Satellite Service ("DBS"), VCRs and DVD players over the past several years has made the viewing public less inclined to accept inferior, sometimes "snowy" UHF signals received at the fringe of reception.[26/] Moreover, many DBS viewers simply cannot receive local signals without the use of their own personal indoor antennas, and, despite some improvement in antenna designs, those antennas often do not receive clear -- or even acceptable -- UHF signals.[27/] As a result, consumers continue to prefer the clear broadcast signals available primarily from VHF stations.

DBS's efforts to expand into the delivery of local broadcast networks are unlikely to improve the position of UHF stations. As the Commission is aware, the DBS industry currently is working to develop antennas that would enable DBS subscribers to receive over-the-air broadcasts in addition to satellite signals.[28/] At this point, however, broadcasters have not received any assurance from the DBS industry that these new devices would be able to overcome the UHF reception difficulties experienced by the current generation of over-the-air antennas. As a result, even if DBS subscribers at some future time are able to receive broadcast signals,

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26/ *See* Comments of Univision Communications Inc., MM Docket No. 98-35, filed July 21, 1998, at 4 ("Univision Comments").

27/ *See id.* at 4-5.

28/ *See Competition in the Video Programming Distribution Market (Fourth Annual Report)*, 11 CR 147, 200 (1998).

millions of such viewers likely could continue to receive inferior UHF signals. And when these viewers have the option of choosing among scores of digital satellite signals, clear over-the-air VHF signals or "snowy" over-the-air UHF signals, it is unlikely indeed that UHF stations will have any measurable viewership from DBS subscribers.

D. Even With the UHF Discount, UHF Stations Do Not Perform as Well Economically as VHF Stations.

It is not surprising that ABC, Press and CME fail to cite to any statistics demonstrating that UHF and VHF stations perform at an economic par with each other. The economic evidence demonstrates clearly that the UHF handicap is alive and well. VHF stations, by virtue of their superior signal strength, cable carriage and preferred cable channel assignments, continue to out-perform UHF stations by more than 50% with respect to *both* revenues and audience share ratings. Coupled with the significant costs of operating a UHF station, there can be no doubt that UHF stations remain economically handicapped when compared to their VHF competitors.

The comments filed in this proceeding provide convincing evidence of the economic disparity between UHF and VHF stations. In its Comments, Paxson showed that, because a UHF station, by its very nature, must operate with higher power than a VHF station, and because higher power requires more electricity and a more powerful transmitter, it is far more expensive to operate a UHF station than a VHF station. A UHF station's electricity costs alone range from one and one-half to three times a VHF station's electricity costs.[29] Whereas a transmitter for a

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[29] Paxson Comments at 11 and Exhibit A.

low channel VHF station costs about $400,000, it costs a UHF station almost three times that figure for a UHF transmitter.[30]

The economic studies submitted with the Comments of the National Association of Broadcasters ("NAB") demonstrate that VHF network affiliates on average receive higher ratings and generate much higher revenues than UHF network affiliates.[31] As set forth in the Everett Study, VHF affiliates in all DMAs averaged a 9.8 prime-time rating while UHF affiliates in the same markets averaged only a 6.4 prime-time rating.[32] Similar evidence showing the disparity in ratings was presented in ALTV's Comments.[33]

The disparity in revenues is even greater, far exceeding 50%. For example, from 1993 through 1996, UHF affiliates of ABC, NBC and CBS generated 41.8% to 44.1% of the net revenues, 34.3% to 37.1% of the cash flow, and 19.6% to 24.1% of the pre-tax profits that were generated by VHF affiliates of the same networks.[34] In 1996 alone, ABC's UHF affiliates generated only 32.4% of the net revenues, 4.5% of the pre-tax profits, and 24.6% of the cash flow that was generated by ABC's VHF affiliates, reflecting a 75% disparity.[35] If the UHF

30/ *Id.*

31/ *See* Stephen E. Everett, Ph.D., *The "UHF Penalty" Demonstrated* (the "Everett Study"), at 1, submitted as Appendix C to the Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998 ("NAB Comments"); Mark R. Fratrik, Ph.D., *A Financial Analysis of the UHF Handicap,* submitted as Appendix D to NAB Comments, at 1 (the "Fratrik Study").

32/ Everett Study at 1. *See* Paxson Comments at 9.

33/ *See* ALTV Comments at 21-25.

34/ Fratrik Study at 2, Figure 1.

35/ *Id.* at 5, Figure 3.

handicap no longer exists, how does ABC explain this 75% disparity between its UHF and VHF affiliates' economic performance?

The comments and evidence submitted in this proceeding overwhelmingly support Commission action retaining the UHF discount. It cannot be disputed that UHF stations are handicapped in signal reach and that this handicap results in inferior economic performance. Mandatory cable carriage has helped to strengthen UHF stations, but it by no means has corrected the UHF handicap. And, it is certain that digital television and DBS will only perpetuate, not alleviate the UHF handicap. In short, the continued existence of the UHF handicap warrants retaining the UHF discount.[36]

E. The UHF Discount Serves to Enhance Diversity and Competition.

There is no factual basis for CME's assertion that the UHF discount stifles competition and diversity because it purportedly "provides an unfair competitive advantage" to UHF owners

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[36] ABC's suggestion that the Commission alternatively apply the UHF discount on a market-by-market basis is untenable and unsupported by the meager evidence that ABC submits. *See* ABC Comments at 21. The 50% discount is a bright-line rule, easy to apply and accurately reflecting the UHF handicap described above. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy, Further Notice of Proposed Rule Making*, 11 FCC Rcd 19895, 19901 (1996) ("We seek to apply bright line attribution tests wherever possibie"); *Amendment of Parts 20 and 24 of the Commissions Rules, Report and Order*. 11 FCC Rcd 7824, 7881 (1996) (adopting "bright line" twenty percent attribution rule in CMRS ownership context in part to avoid "problems" inherent in "frequent case-by-case determinations of control, which are time-consuming, fact-specific, and subjective"), *modified*, 11 FCC Rcd 8714 (1996), *recons. denied*, 12 FCC Rcd 14031 (1997); *Amendment of Commission's Rules to Establish New Personal Communications Services in the 2 GHz Band, Further Order on Reconsideration*, 9 FCC Rcd 4441, 4441 (1994) (observing that Commission previously had "reaffirmed our bright-line cross-ownership attribution standards" for cellular and broadband PCS because such rules "would result in a faster, less burdensome licensing process;" on further reconsideration, Commission added a multiplier to PCS ownership rules similar to that used in broadcast attribution rules).

over VHF owners.[37] Indeed, CME is wrong for more reasons than can be counted. First, as described above, the economic performance of UHF stations simply does not bear out CME's conclusion. UHF stations that garner only 25% of the revenues earned by their VHF counterparts do not have any advantages, much less a competitive advantage. Second, the historical improvement in UHF service and the growth of new broadcast networks, enabled by the UHF discount, has resulted in *increased* program diversity, offering viewers more choices, and *more effective* competition for the larger and more established television networks. Finally, since the UHF discount was adopted, the video programming industry has exploded -- there are far more alternatives for viewers today than existed in 1985, making it clear that the UHF discount has not had and could not have an adverse impact on competition or diversity.

1. The UHF Discount Has Contributed to the Growth in UHF Television Service.

CME fails to recognize that absent the UHF discount, group owners like Paxson and Fox would have very little incentive to acquire and invest capital in UHF stations. Moreover, with the increased ownership opportunities made available by the UHF discount, group owners are able to realize economies of scale and operational efficiencies that improve UHF station performance, and in turn, service to the public.

UHF stations' limited signal reach and difficulties in securing cable carriage simply make UHF stations less attractive properties than VHF stations. As a result, the economic investment necessary to improve UHF station performance could not be sustained if a group owner could not use the UHF discount to acquire a sufficiently large number of stations.

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[37] CME Comments at 18-19.

Through the UHF discount, Paxson, Fox and other group owners have acquired a significant number of UHF stations, thereby overall increasing UHF station potential and resulting in an overall increase in the number of UHF stations nationwide. Over the past two years alone, Paxson has constructed 17 full power UHF stations, and has substantially rebuilt the technical facilities of approximately 20 more full power UHF stations. In addition, Paxson's "Proposal to the FCC to Increase Broadcast Diversity," if adopted, could result in the licensing of an additional 100 television stations, many of them in the UHF band.[38] Absent the UHF discount, however, there would be no incentive for Paxson or any other group owner to engage in these efforts to enhance the UHF service.

Moreover, by virtue of the UHF discount, UHF stations under Paxson's ownership are able to take advantage of the efficiencies that naturally arise under group ownership. Through the sharing of programming, administrative and technical support, and marketing and advertising sales services, Paxson's UHF stations operate more efficiently. The cost savings realized from these economies of scale have significant public interest benefits because they enhance each station's ability to provide high-quality programming and public service.[39] Operating independently of the network or under separate ownership, however, it is unlikely that these stations could achieve the same efficiencies or provide the same level of service.

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[38] *See* Paxson Comments at 30 n.62.

[39] *See* NBC Comments at 15-16; ABC Comments at 6-7; Comments of CBS Corporation, MM Docket No. 98-35, filed July 21, 1998, at 11 ("CBS Comments").

2. *The UHF Discount Is Critical to the Development of New Networks.*

The comments in this proceeding amply demonstrate that the UHF discount provides a significant incentive for the development of new broadcast networks.[40] With the explosive growth in the video programming industry, the broadcast network models established by ABC, CBS and NBC in the 1950s are simply unworkable for a broadcast network emerging in 1998. The majority of the "Big Three" affiliates are separately-owned, operate independently of the network and receive compensation from the network. This model may have worked when only three broadcast networks dominated the video programming market, but it is not feasible for a new network that must compete not only with the "Big Three" networks, but also with Fox, UPN and WB and numerous other media for affiliates, viewers and advertisers. The new economic paradigm based on ownership of, rather than affiliation with, distribution outlets will be the key to any new network's success. Ownership of a sufficient number of distribution outlets, however, can only be achieved through the UHF discount.

In ten days, Paxson will launch its new broadcast television network, PAXTV, that will serve as the new model for broadcast network organization. Paxson currently owns 49 television stations nationwide, and after the completion of pending acquisitions and transactions, will own a total of 69 stations, that will serve as the primary distribution system for PAXTV. It is only through its ownership of these stations that Paxson can ensure that PAXTV will have sufficient distribution at its launch. Absent the UHF discount, of course, Paxson's ownership of this

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[40] *See* ALTV Comments at 27-29.

number of stations would be prohibited[41/] and it is unlikely that Paxson would even be attempting the monumental task of launching a new broadcast network.

With its unique programming and large-scale distribution in top U.S. television markets, PAXTV will provide a much-needed alternative to video programming currently available to U.S. consumers. Unduplicated by other broadcast and cable networks, PAXTV's programming will consist of one-hour drama, situation comedy, talk and information programs and movies, that will be family-oriented, focusing on family values and other issues of broad interest to families. PAXTV programming will be free of the explicit sex, senseless violence and foul language that is found in so many television programs today. At its launch, PAXTV will offer *15* hours of family-oriented original programming each week, including *Little Men, The New Flipper, Neon Rider, It's a Miracle, Great Day, Women's Day* and two hours of children's educational informational programming. The network's leading prime-time programs further exemplify the family focus -- *Touched By An Angel; Promised Land; Dr. Quinn, Medicine Woman; Diagnosis Murder; Highway to Heaven;* and *Life Goes On.* In short, as the seventh broadcast network, PAXTV not only will be able to offer viewers more program choices but also will serve as a viable competitor for the other broadcast networks. None of this would be possible, however, if Paxson could not use the UHF discount to ensure an adequate distribution system for its network programming.

Paxson's reliance on UHF stations to build its network distribution system is consistent with the development of other networks. Fox, UPN and WB all have used and continue to use

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[41/] The stations' aggregate audience reach exceeds 50% of U.S. television households not taking into account the UHF discount. Applying the UHF discount, Paxson's stations are attributed with only 33.77% of U.S. television households.

UHF stations to "grow" their networks. As outlined in Paxson's Comments, the majority of the newer networks' affiliates are UHF stations. UPN has approximately 27 VHF affiliates, compared to 129 UHF affiliates.[42] Fox's affiliates consist of 132 UHF affiliates and only 41 VHF affiliates.[43] It also is undisputed that these new networks have increased competition and diversity in the television industry. As each network has attempted to target various demographic groups, they have provided viable alternatives to "Big Three" network programming. And, they have enhanced the level of competition in the network programming market, as evidenced by Fox's successful bids to air national sports programming. PAXTV will make an equally significant contribution to network competition and program diversity.

3. *National and Local Competition for the Delivery of News, Information and Entertainment to American Consumers Has Never Been Greater.*

The UHF Discount has not had, nor will it have, any negative effect on program diversity or competition. As Paxson and numerous other commenters observed in their comments, Americans currently are faced with a tremendously broad array of news, information and entertainment vehicles.[44] NAB pointed out that a double-digit increase in the number of television stations during just the last eleven years has come about during a time when cable systems, offering an ever increasing number of channels, and VCR players have enjoyed amazing increases in their household penetration rates.[45] The enormous number of video

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[42] Paxson Comments at 19-20 & n.46.

[43] *Id.* at 20 & n.47.

[44] *See, e.g.*, Paxson Comments at 28; ABC Comments at 3; CBS Comments at 3.

[45] *See* Mark R. Fratrik, Ph.D., *Media Outlets by Market - Update*, submitted as Appendix A to NAB Comments.